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IN THE

Supreme Court of the United States

October Term, 1960

No. 28

RESPONDENTS' BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 28

RAPHAEL KONIGSBERG,

Petitioner,

vs.

STATE BAR OF CALIFORNIA AND THE COMMITTEE OF BAR EXAMINERS OF THE STATE OF CALIFORNIA.

RESPONDENTS' BRIEF.

I.

Questions Presented.

1. Is the denial by the California Supreme Court of the petitioner's application for admission to the Bar on the ground that he refused to disclose his relationship with the Communist Party in the present and recent past consistent with the decision of this Court in *Konigsberg v. State Bar*, 353 U. S. 252?

2. Does the denial by the California Supreme Court of the petitioner's application for admission to the Bar on the basis of California law in existence before the petitioner entered law school raise any constitutional issue independent of those presented by the substance of the law applied?

3. Was the petitioner given adequate warning by the Committee investigating his fitness to practice law that his continued refusal to disclose his relationship with

the Communist Party in the present and the recent past would result in the denial of his application for admission to the bar?

4. Does the denial by the California Supreme Court of the petitioner's application for admission to the Bar, on the ground that he refused to disclose his relationship with the Communist Party in the present and the recent past deny any of the petitioner's constitutional rights?

II.

Constitutional and Statutory Provisions Considered.

The Fourteenth Amendment provides:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The basic act governing admission to the bar in the State of California is to be found in the Business and Professions Code of the State of California. The principal sections involved are Sections 6060 and 6064.1. These sections read as follows:

> "§6060. Qualifications for Applicants:
>
> "To be certified to the Supreme Court for admission and a license to practice law, a person who does not comply with section 6062 shall:
>
> (a) Be a citizen of the United States.
>
> (b) Be of the age of at least 21 years.
>
> (c) Be of good moral character.

(d) Have been a bona fide resident of this State for at least three months immediately prior to the date of his final bar-examination. . . ."

"§6064.1. One Advocating the Overthrow of Government Not to be Admitted:

"No person who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means, shall be certified to the Supreme Court for admission and a license to practice law."

The following sections of the Business and Professions Code are those which empower and command the Committee to investigate the fitness of applicants for admission to practice.

"§6046. Examining Committee: Powers. The board may establish an examining committee having the power:

(a) To examine all applicants for admission to practice law.

(b) To administer the requirements for admission to practice.

(c) To certify to the Supreme Court for admission those applicants who fulfill the requirements provided in this chapter."

"§6047. Same: Rules and Regulations. Subject to the approval of the board, the examining committee may adopt such reasonable rules and regulations as may be necessary or advisable for the purpose of making effective the qualifications prescribed in Article 4."

"§6048. Committees to Take and Report Evidence: Reports: Records. The board may also appoint one or more committees to take evidence on behalf of the board and to forward the same to the board with a recommendation for action by the board.

"A record of all hearings shall be made and preserved by the board or committee."

"§6049. Power to Take and Require Proofs. In the conduct of investigations and upon the trial and hearing of all matters, the board and any committee having jurisdiction, including the examining committee, may:

(a) Take and hear evidence pertaining to the proceeding.

(b) Administer oaths and affirmations.

(c) Compel by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding."

III.

Statement of the Case.

In 1953 the petitioner, Raphael Konigsberg, applied for admission to the Bar of the State of California. Thereafter hearings were conducted by the Southern Subcommittee of the Committee of Bar Examiners and by the full Committee to determine whether petitioner could be certified to the California Supreme Court as qualified for admission.

At these hearings, petitioner presented evidence of his qualifications. He was confronted with testimony that he was once a member of the Communist Party and with other evidence which raised doubts in the

mind of the Subcommittee and the Committee whether they could properly certify him for admission. He was asked, but consistently refused to answer, whether he was, or had been, a member of the Communist Party of the United States or any organizations associated with or dominated by that Party and refused to answer other questions regarding related activities. [1956 Rec. pp. 109, 117 *et seq.*, 125-126.][1]

The Committee determined that the petitioner had not sustained the burden of proof that he was possessed of a good moral character and that he did not advocate the possible overthrow of the government. [1956 Rec. p. 344.]

The Supreme Court of California refused to review this determination, with three Judges voting for a hearing.

On certiorari, this Court found that there was insufficient evidence in the record rationally to support a determination that petitioner lacked good moral character or advocated the violent overthrow of the government. The right of the State to exclude Mr. Konigsberg from practice because he refused to divulge information regarding his background to those charged with investigating his qualifications, after due warning of the possible consequences of his refusal, was expressly left open by the decision of this Court. (*Konigsberg v. State Bar*, 353 U. S. 252.)

After remand, the Supreme Court of California referred the matter to the Bar Examiners for further

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[1] In order to avoid confusion, the printed record before this Court in 1956 and the present record will be designated in conformance with the style employed in the petitioner's brief.

investigation and evaluation. [1960 Rec., p. 2.] Pursuant to the order of that Court, the Committee conducted a further hearing on September 21, 1957. [1960 Rec. p. 3.]

At this hearing, the petitioner was advised that it was the statutory duty of the Committee to conduct a thorough inquiry into his eligibility for admission to the Bar and that it was his duty to be completely candid and frank with the Committee. He was exhaustively warned by Chairman Whitmore, both before and after his examination, of the detrimental consequences to a favorable consideration of his application which would ensue from his refusal to answer questions relating to his membership in the Communist Party:

> "I have generally outlined to Mr. Mosk the scope of the proposed hearing today. I should like to point out to Mr. Konigsberg, as well as to Mr. Mosk, that the functions of the Committee of Bar Examiners are really two-fold: First to investigate in connection with the requirements for admission to practice set forth in the Business and Professions Code; and second to make determinations. *As a result of our two-fold purpose, particularly our function of investigation, we believe it will be necessary for you, Mr. Konigsberg, to answer our material questions or our investigation will be obstructed. We would not then as a result be able to certify you for admission.* If you have questions we shall certainly be happy to have your counsel or you address them to us. We should certainly make every effort to limit our questions to those which are material ones.
>
> * * *

"Mr. Konigsberg, as indicated at the beginning of this proceeding, the Committee is really charged with two functions, one to investigate, and one to determine. Your counsel has asked the Committee, asked me, for an indication as to the scope and purpose of this hearing. I indicated to him what the scope and purpose is, and as a result you are aware of it. We are engaged in the function of investigating matters which we are charged with the responsibility of determining under the law of the State of California. We have every intention and desire of carrying out that investigative duty consistent with the constitutional protections and freedoms that the United States and the California constitutions provide. We still have an obligation to investigate. I believe that we are charged with this responsibility as it might apply to your application for admission. That investigation can be carried out in a number of ways. In connection with determining whether or not you meet the minimum standards to practice law as far as the knowledge of the subject of law is concerned, we have asked you questions in an examination, and you have given us answers. In connection with other requirements for admission to practice, as set forth in the Business and Professions Code of California, we have asked you to fill out an application, which you have done. Also as part of our investigation and your satisfying each and all of these requirements to practice law we have called you before the Committee. We have asked questions of you. We are merely now engaging in that investigation which we have engaged in by having hearings, by having you fill

out applications, and by asking you to take an examination before. Now, this is part of that same function. * * *

* * *

"Mr. Konigsberg, I think you will recall that I initially advised you a failure to answer our material questions would obstruct our investigation and result in our failure to certify you. With this in mind do you wish to answer any of the questions which you heretofore up to now have refused to answer?" (Emphasis added.) [1960 Rec. pp. 4, 22, 26.]

The Committee also explained to the petitioner the pertinency of questions regarding his membership in the Communist Party to its inquiry into his qualifications for admission to the Bar.

"If you answered the question, for example, that you had been a member of the Communist Party during some period since 1951 or that you were presently a member of the Communist Party, the Committee would then be in a position to ask you what acts you engaged in to carry out the functions and purposes of that party, what the aims and purposes of the party were, to your knowledge, and questions of that type. You see by failing to answer the initial question there certainly is no basis and no opportunity for us to investigate with respect to the other matters to which the initial question might very well be considered preliminary.

* * *

"Mr. Mosk, you realize that if Mr. Konigsberg had answered the question that he refused to an-

swer, an entirely new area of investigation might be opened up, and this Committee might be able to ascertain from Mr. Konigsberg that perhaps he is now and for many years past has been an active member of the Communist Party and from finding out who his associates were in that enterprise we might discover that he does advocate the overthrow of this government by force and violence. I am not saying that he would do that, but it is a possibility, and we don't have to take any witness' testimony as precluding us from trying to discover if he is telling the truth. * * *" [1960 Rec. pp. 29, 31.]

Nevertheless, petitioner refused to divulge whether he has been a member of the Communist Party at any time since 1951, *or whether he is presently a member of such party.* [1960 Rec. p. 24.][2] In each instance, the petitioner predicated his refusal to answer upon his rights under the First Amendment and Article I, Section 1, of the California Constitution. [1960 Rec. p. 24.]

The full sweep of Mr. Konigsberg's ideas regarding the permissible limits of an inquiry by those charged with examining the qualifications of applicants for ad-

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[2]The petitioner's unsupported statement quoted on page 15 of his brief, that he "never advocated the overthrow of the government or belonged to an organization that advocated the overthrow of the government" certainly does not foreclose further inquiry by the Committee into this vital area.

mission to the Bar is revealed by his comments at the hearing.

"Chairman Whitmore: How can we make a determination with respect to the nature of your activities with the Communist Party if you were, assuming you were, a member if we have no basis for questioning you concerning them? You won't answer our question as to whether or not you were ever a member. That question in that respect would be a preliminary question, would it not?

A. You have asked me if I advocate the overthrow of the government, if I committed any illegal acts. I answered gladly. I never have, I don't now, and I never will. I am incapable of doing it.

Mr. O'Donnell: Suppose we don't believe you, don't you think we are entitled to ask you as to your association with the Communist Party and your membership with the Communist Party as part of our examination?

A. *You are entitled to ask me only with respect to phases of illegal activity. You cannot ask me or any citizen about his activities that are legal, that are protected under the First Amendment, under the part of normal civic activity.* * * *" (Emphasis added.)

[1960 Rec. p. 28.]

In other words, the substance of Mr. Konigsberg's position is: You may ask me if I have committed specific criminal or illegal acts. You may not make any inquiry regarding activity which is not *per se* illegal even if this inquiry might lead directly to evidence of activities which would clearly disqualify me from ad-

mission to the California Bar. If I do not admit to criminal activity, or if you cannot prove such activity on my part, I am entitled to admission to the Bar although I have refused to reveal to you important areas of my background.

The Committee made the following findings in its report to the Supreme Court of California:

"(1) That the questions put to the applicant by the Committee concerning past or present membership or affiliation with the Communist Party are material to a proper and complete investigation of his qualifications for admission to practice law in the State of California.

(2) That the refusal of applicant to answer said questions has obstructed a proper and complete investigation of applicant's qualifications for admission to practice law in the State of California.

(3) That the refusal of applicant to answer said questions has obstructed a necessary and proper function of the Committee under Section 6046 and related sections of the Business & Professions Code of the State of California and under the Rules Regulating Admission to Practice Law in California adopted pursuant to Section 6047 and related sections of said Code.

(4) That in view of the foregoing, the Committee is unable to certify that applicant possesses the requisite qualifications or has fulfilled the requirements for admission to practice law in the State of California."[3]

[3]The report of the Committee of Bar Examiners to the Supreme Court of California is not included in the printed transcript before this Court, but was summarized in the opinion below [1960 Rec. p. 55] and is set forth as Exhibit A to this brief.

The Supreme Court of California reviewed the entire record, adopted the findings of the Committee and refused to admit the petitioner to the practice of law. [1960 Rec. p. 52.]

IV.

Summary of Argument.

A. In its prior opinion, this Court stressed that the petitioner had not been denied admission to practice because of his refusal to answer relevant questions but because the evidence created substantial doubts regarding his moral character and loyalty. The evidence raising these doubts was found to be insufficient to support a finding adverse to his qualifications, but this Court expressly stated that it did not "mean to approve or disapprove Konigsberg's refusal to answer the particular questions asked of him" and would consider the permissibility of a refusal to admit for failure to answer relevant questions when that situation arose.[4] The case was then remanded for "further proceedings not inconsistent with this opinion." (*Konigsberg v. State Bar*, 353 U. S. 252, 261, 262, 274.)

It is respectfully submitted that the proceedings now to be reviewed by this Court are entirely consistent with its former opinion. The petitioner has been refused admission on the precise ground which this Court held not to have previously been in issue.

B. The refusal of the Supreme Court of California to admit the petitioner to the practice of law because

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[4]Justices Harlan and Clark in their dissenting opinion concluded and respondents in their Petition for Rehearing stressed that refusal to answer relevant questions was, and has always been, grounds for denying admission to the California Bar.

of his obstruction of the examination into his qualifications was not a novel proposition or one that could not have been foreseen by the petitioner.

In the first place, there can be no question of the fact that it *is* the law of California that an applicant who refuses to answer relevant questions pertaining to his qualifications will not be admitted. The Supreme Court of California so held in the opinion below; and that Court is the body with the ultimate authority in California to set and determine the qualifications for admission to practice before it. The only federal question posed is whether this rule is so arbitrary and capricious as to violate provisions of the constitution. (*Theard v. United States*, 354 U. S. 278, 281; *Re Summers*, 325 U. S. 561, 570-571.) It is quite immaterial whether this is a "new rule" or an old one in view of the fact that (1) the petitioner was exhaustively warned by the Committee of the probable consequences of his refusal to answer and (2) the power to remove this impediment to his qualifications always was and is now in the petitioner's hands.

However, in point of fact, the opinion of the Court below does not purport to formulate a new rule, but merely construes and applies the existing law of California. Sections of the Business and Professions Code which have been on the books at least since 1939 require the Committee of Bar Examiners to examine all applicants for admission to the practice of law, administer the requirements for admission, and certify qualified applicants to the Supreme Court of California for admission. Section 6064.1 of that Code, added in 1951, enjoins the Committee from certifying any applicant who advocates the overthrow of the government of the

state or nation by forcible, violent or unconstitutional means. The Court below construed these statutes to require the Committee to make the inquiries it did make; found the questions relating to petitioner's membership in the Communist Party in the present and recent past to be relevant to this inquiry; and construed these statutes to proscribe the admission of an applicant blocking this legislatively compelled inquiry. [1960 Rec. pp. 53, 56, 57-58.]

When at the 1957 hearing the Committee warned the petitioner of this legislative mandate, he either disagreed or was indifferent to the California law in this regard. It is respectfully submitted that the fact that petitioner bore the usual consequences of one who ignores or misgauges the effect of the existing law upon his actions raises no independent constitutional question. This is particularly true in view of the fact that the petitioner is capable of correcting the impediment to his admission at any time if his answers would fail to disclose any reason for his disqualification.

Finally, many decisions of the California courts prior to that involving this petitioner are authority for the result reached here. Not only were other applicants prior to petitioner denied admission because of their refusal to answer pertinent questions posed by the Committee,[5] but in many cases the Supreme Court of California had stressed the obligation of an applicant to be candid and frank in disclosing details of his background bearing upon his qualifications. The reason

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[5]These petitions for admission were denied without a written opinion by the Supreme Court of California but are described and identified in the quotation from the article by Goscoe O. Farley set forth on page 27 of this brief.

assigned by the Court for this requirement was that otherwise the Committee could not adequately investigate the fitness of the applicant for admission. This reason applies precisely to the conduct of the petitioner. Although the applicants involved in the cases mentioned were devious while petitioner has been boldly defiant, each accomplished the same result. Each foreclosed the inquiry of the Committee into matters which the applicant desired to remain secret but which were essential to the investigation of his qualifications for admission.

C. It is surely an unsound constitutional argument that a state is compelled to admit an applicant to practice law although he refuses to disclose relevant areas of his background; that the decision of the state to exclude him for so long as this situation obtains is so arbitrary and capricious as to justify federal intervention. Examples of applicants refusing to discuss their association with known criminal elements or syndicates should give pause to one so contending. If there is no dispute with the reasonableness of the general requirements, the only constitutional issues presented here are (1) whether the particular questions asked and unanswered were relevant to the inquiry into the petitioner's qualifications and (2) whether the petitioner's refusal to answer these questions, though relevant, is entitled to some special constitutional protections not present in the case of refusal to answer other pertinent questions.

As stated above, Section 6064.1 of the California Business and Professions Code specifically prohibits the respondents from certifying for admission to the California Bar an applicant advocating the overthrow of the Government by forcible, violent or unconstitutional

means. In view of the overwhelming legislative and judicial findings that the Communist Party is an agency dedicated to such ends, it cannot reasonably be contended that the inquiry was not relevant to the forbidden advocacy or was an idle foray into his "political beliefs."

Recent cases decided by this Court have foreclosed the contention that California is barred from attaching the consequences which it did to the petitioner's refusal to answer the questions posed. For example, a witness before a legislative committee who refuses to answer similar questions may be punished for his refusal to answer. (*Barenblatt v. United States*, 360 U. S. 109; *Uphaus v. Wyman*, 360 U. S. 72.) More directly to the point, school teachers, subway conductors and social workers may be dismissed for refusing to answer the same or similar questions directed to them by their superiors. (*Beilan v. Board of Education*, 357 U. S. 399; *Lerner v. Casey*, 357 U. S. 468; *Nelson and Globe v. County of Los Angeles*, 362 U. S. 1, 4 L. Ed. 2d 494.)

Each of these decisions is pertinent and determinative of this appeal unless it be considered that the state has a less vital concern in the integrity of members of its bar than in the integrity of its school teachers, subway conductors and social workers. We respectfully submit that this cannot possibly be the case. An attorney is an officer of the court, and, like the court itself, is an instrument or agency to advance the ends of justice. (*Theard v. United States*, 354 U. S. 278, 281; *In re Rouss*, 221 N. Y. 81, 116 N. E. 782; *People v. Mattson* (1959), 51 Cal. 2d 777, 793, 336 P. 2d 937, 949.) "The right to practice law not only presupposes in its possessor integrity, legal standing and attainment, but

also the exercise of a special privilege, highly personal and partaking of the nature of a public trust." (*Townsend v. The State Bar* (1930), 210 Cal. 362, 364, 291 Pac. 837, 838.) He is charged by the legislature with obligations requiring the highest degree of moral fiber, fairness and competence. (Calif. Bus. and Prof. Code §6068.)

In view of the unique and vital role played by the lawyer in the administration of justice, the interest of the people of California in insuring the moral and professional fitness of members of the bar seems obvious. It is respectfully submitted that the requirement of full disclosure by applicants of areas of their backgrounds relevant to their qualifications to practice law as a condition to admission to practice is an entirely reasonable method of achieving this goal.

Finally, this Court pointed out in its former opinion that it would be necessary to warn the petitioner of the consequences of his refusal to answer so that he would not be surprised at the consequences of his course of action. (*Konigsberg v. State Bar*, 353 U. S. 252, 261, 262.) At the hearing in 1957 which is the subject of the present review, the petitioner was exhaustively warned by the Committee of the probable consequences of his refusal to answer inquiries relating to his membership in the Communist party in the present and recent past. [1960 Rec. pp. 4-5, 22-23.]

V.

Argument.

A. The Denial of Mr. Konigsberg's Application for Admission to the California Bar by the California Supreme Court Is Completely Consistent With the Decision of the United States Supreme Court in Konigsberg v. State Bar, 353 U. S. 252.

A single issue on the merits was previously decided:

> "We now pass to the issue which we believe is presented in this case: Does the evidence in the record support any reasonable doubts about Konigsberg's good character or his loyalty to the Governments of State and Nation?"
>
> *Konigsberg v. State Bar*, 353 U. S. 252, 262.

The question whether Mr. Konigsberg could be denied admission to the State Bar of California solely by reason of his refusal to answer questions which were relevant and material to a determination of his eligibility for admission to practice was determined not to be before this Court and was not passed on by it:[6]

> "He was not denied admission to the California Bar simply because he refused to answer questions.
>
> "In Konigsberg's petition for review to the State Supreme Court there is no suggestion that

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[6]This Court has reaffirmed in its subsequent decisions of *Whelan v. Board of Education*, 357 U. S. 399, 409, and *Lerner v. Casey*, 357 U. S. 468, 478, that it did not intend to and did not pass on these questions. Also, it should again be pointed out that both the dissenting Justices Harlan and Clark and the respondents in their Petition for Rehearing unsuccessfully opposed the finding of the majority that this ground of disqualification was separate and not in issue.

the Committee had excluded him merely for failing to respond to its inquiries. Nor did the Committee in its answer indicate that this was the basis for its action. . . .

* * *

"If it were possible for us to say that the Board had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly. There is no justification for our straining to reach these difficult problems when the Board itself has not seen fit, at any time, to base its exclusion of Konigsberg on his failure to answer. If and when a State makes failure to answer a question an independent ground for exclusion from the Bar, then this Court, as the cases arise, will have to determine whether the exclusion is constitutionally permissible. *We do not mean to intimate any view on that problem here nor do we mean to approve or disapprove Konigsberg's refusal to answer the particular questions asked him.*" (Emphasis added.)

Konigsberg v. State Bar, 353 U. S. 252, 261, 262.

This Court then held that the evidence in the record did not justify a determination that Mr. Konigsberg was not a man of good moral character or that he advocated the violent overthrow of the government. The judgment of the California Supreme Court was thereupon reversed and the case "remanded for further proceedings not inconsistent with this opinion." (*Konigsberg v. State Bar*, 353 U. S. 252, 274.)

The language used indicated, and we submit that it was the intention of this Court, that the case should be returned to the jurisdiction of the State of California for such further proceedings as were necessary and proper under the State law to determine whether Mr. Konigsberg should be admitted to the California Bar.

The Supreme Court of California ordered the matter referred to the Committee of Bar Examiners for further proceedings in the light of the opinion of this Court. Pursuant to this order, the Committee conducted a hearing and issued its Report to the Supreme Court of California. Said Report is attached as Exhibit A. As set forth in more detail in its Report, the Committee determined, without dissent, that Mr. Konigsberg's refusal to answer material questions had obstructed a proper and complete investigation of his qualifications for admission to practice law in the State of California and that it was therefore unable to certify him for admission to practice.

The California Supreme Court determined that petitioner could and should be denied admission to the California Bar on this ground. Justice Traynor, one of the two dissenting judges, agreed that Mr. Konigsberg could properly be denied admission on this ground and differed only on the question whether such action should be taken:

> "The United States Supreme Court reversed the judgment of this court and remanded the case 'for further proceedings not inconsistent with this opinion.' (353 U. S. at 274.) In view of the questions expressly left undecided and the court's remand, it is my opinion that this court is not foreclosed by the United States Supreme

Court's decision in this case from adopting and applying to Konigsberg a rule making failure to answer relevant questions with respect to his qualifications an independent ground for exclusion." [1960 Rec. p. 59.].

We respectfully submit that:

(1) It was not the intention of this Court to foreclose further proceedings, but rather to remand for such further proceedings and decision as were appropriate under the law and procedures of the State of California; and

(2) The action taken by the Committee of Bar Examiners and the State Supreme Court are entirely consistent with the order of this Court.

B. It Is Now and Has for Decades Been the Law in California That an Applicant for Admission to the Bar Must Be Candid and Frank in Disclosing His Background and Qualifications for Admission to the Bar and Will Not Be Admitted Until Such Free and Candid Disclosure Has Been Made.

Petitioner and *amici curiae* have persistently advanced the argument that The State Bar and Supreme Court of California have promulgated a "new rule" for the sole purpose of preventing a deserving individual from practicing law. Wholly aside from the fact that this argument presupposes unlikely and unworthy conduct by those demonstrably dedicated to the maintenance of high professional standards in the legal profession, it is erroneous as a proposition of law.

Stated affirmatively, the argument is: There is no formal rule enacted by the legislature or contained in the Rules Regulating Admission to Practice Law read-

ing "An applicant who refuses to answer relevant questions pertaining to his fitness to practice law may be denied admission until he makes full disclosure to the Committee"; therefore, an applicant may refuse to answer relevant questions at his selection and must be admitted unless the Committee by independent investigation can prove that his answers would disclose his disqualification. In addition to being unthinkable from a practical standpoint, and directly contrary to the unquestioned requirement in California that an applicant bear the burden of proving his fitness to practice law,[7] this proposition is entirely refuted by the facts that (1) the Supreme Court of California is the ultimate body for determining the qualifications of applicants for admission to practice before ; (2) that Court has determined that an applicant who refuses to answer relevant questions posed to him by the Committee will not be admitted; (3) this decision was predicated upon statutes which have been in existence prior to 1939, before this petitioner entered law school; (4) the Supreme Court of California has previously refused to admit other applicants upon the exact ground present in this case; and (5) the requirement of candor and frankness with the Court and the Committee on the part of applicants for admission is an established proposition of long standing in California.

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[7]Rule X, Section 101 of the Rules Regulating Admission to Practice Law in California, set forth on page 4 of petitioner's brief, provides in part: "The applicant shall have the burden of proving that he is possessed of good moral character, of removing any and all reasonable suspicions of moral unfitness, and that he is entitled to the high regard and confidence of the public." See also *Spears v. The State Bar* (1930), 211 Cal. 183, 188, 294 Pac. 697, 698-699; *In re Wells* (1917), 174 Cal. 467, 474-475, 163 Pac. 657, 660.

Beyond this, there is no question of "surprise" on the part of the petitioner to the application of such a requirement. As is established in other portions of this brief, the petitioner was exhaustively advised throughout the proceedings of the probable consequences of his refusal to answer questions.

(1) *The law of California has been conclusively declared by the California Supreme Court, which has the ultimate authority to set and determine the qualifications of applicants for admission to practice before it.*

In California, though the legislature is empowered to set minimal standards for admission to practice, it is the Supreme Court of the State which is vested with the ultimate authority to prescribe standards for admission to practice before it and to determine what applicants meet those standards. (*Re Lavine* (1935), 2 Cal. 2d 324, 327-328, 41 P. 2d 161, 162; *In re Hallinan* (1954), 43 Cal. 2d 243, 253-254, 272 P. 2d 768, 775.) In the exercise of this responsibility, the Supreme Court of California has determined that one refusing to answer relevant questions will not be admitted. In the opinion below, the Court approved the finding of the Committee that "Konigsberg had refused to answer its questions as to his membership in or affiliation with the Communist Party, that these questions were material to a proper determination of his qualifications, that his refusal to answer had obstructed the investigation which the statute requires, and that because of this refusal the committee is unable to certify him for admission." [1960 Rec. p. 55.] There can be, therefore, no question of what is the law on this point in the State of California. Nor, since each state is free to set its own standards for admission to

its bar, is it in issue whether this Court would choose to apply the same rule in its admission of practitioners to the Federal Bar. The sole issue is whether the law as applied in the State of California is so arbitrary, capricious and unreasonable as to deprive the applicant of his rights under the Constitution. (*Theard v. United States*, 354 U. S. 278, 281; *Re Summers*, 325 U. S. 561, 570-571.)

(2) *The decision below was based upon established law and is entirely consistent with and predicated upon prior decisions and statutes available equally to the petitioner and the Committee.*

The legislature of California, prior to 1939,[5] provided for the creation of a Committee of The State Bar to examine all applicants for admission to the practice of law, administer the requirements for admission, and certify to the Supreme Court of California for admission those applicants meeting the qualifications therefor. (Business and Professions Code §6046.) To fulfill these duties, the Committee was authorized to adopt such rules and regulations as might be necessary or advisable "for the purpose of making effective" the statutory qualifications for admission (Business and Professions Code §6047) and empowered to conduct hearings and receive and compel evidence regarding the

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[5]The basic authority of the Committee to examine applicants for admission was first provided in Sections 24 and 25 of The State Bar Act of 1927 (Calif. Stats. 1927, p. 41). Between the years 1927 and 1939, the authority granted by these sections was amended and amplified (Calif. Stats. 1929, pp. 1257, 1259, 1965; Calif. Stats. 1931, p. 1761; Calif. Stats. 1937, p. 1492) until it was codified in its present form in 1939 (Calif. Stats. 1939, pp. 347, 352).

qualifications of applicants. (Business and Professions Code §§6048, 6049.)

One of the substantive qualifications for admission, which it is the duty of the Committee to "make effective", is that the applicant not be a person "who advocates the overthrow of the Government of the United States or this State by force, violence, or other unconstitutional means." (Business and Professions Code §6064.1). This section specifically enjoins the Committee from certifying such a person for admission.

The court below, after citing these statutory provisions [1960 Rec. p. 53] held that Section 6064.1 "clearly requires the Committee to inquire" into the forbidden advocacy [1960 Rec. p. 56]; that questions relating to recent or present membership in the Communist Party were relevant to this inquiry [1960 Rec. p. 56]; that petitioner's refusal to answer the questions obstructed the inquiry; and that

> "Implicit in the statutory provision for review of the committee's refusal to certify an applicant is the power of this court to admit one not so certified. But to admit applicants who refuse to answer the committee's questions upon these subjects would nullify the concededly valid legislative direction to the committee. Such a rule would effectively stifle committee inquiry upon issues legislatively declared to be relevant to that issue. We cannot in good conscience deny the committee the right to inquire into a matter as to which it must certify." [1960 Rec. 57-58.]

At the hearing of September 21, 1957, the Committee exhaustively warned the petitioner that the Commit-

tee construed the statutory directives under which it operated to require it to refuse to certify an applicant who refused to answer relevant inquiries into his qualifications. [1960 Rec. pp. 4-5, 22-23.][9] The petitioner either disagreed with this interpretation or was indifferent to the law of California in view of his insistence that he had a constitutional right to refuse to answer and yet be certified.

Therefore, the substance of the matter is that the petitioner was wrong and the Committee was right in its estimate of the existing law of California. The petitioner chose to stand on his estimate of what that law was, proved to be incorrect and suffered the normal consequences incident to ignoring or misgauging the effect of the existing law upon one's actions. It is respectfully submitted that this fact raises no constitutional issue independent of those considered in Point "C" of this Argument.

In addition to the significant fact that the petitioner was not the first applicant to be denied admission because of his refusal to answer pertinent questions posed

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[9]For example, at the outset, Chairman Whitmore advised the petitioner, "I have generally outlined to Mr. Mosk the scope of the proposed hearing today. I should like to point out to Mr. Konigsberg, as well as to Mr. Mosk, that the functions of the Committee of Bar Examiners are really two-fold: First to investigate in connection with the requirements for admission to practice set forth in the Business and Professions Code; and second to make determinations. As a result of our two-fold purpose, particularly our function of investigation, we believe it will be necessary for you, Mr. Konigsberg, to answer our material questions or our investigation will be obstructed. We would not then as a result be able to certify you for admission." [1960 Rec. pp. 4-5.]

ly the Committee,[10] there is nothing new in the requirement that an applicant for admission to practice law display a high degree of candor and frankness with the Committee and the Court in disclosing matters in his background pertinent to his qualifications. (*Spears v. The State Bar* (1930), 211 Cal. 183, 294 Pac. 697; *State Bar v. Langert* (1954), 43 Cal. 2d 636, 276 P. 2d 590; *In re Lasley* (1923), 61 Cal. App. 59, 214 Pac. 284; *In re Wells* (1918), 36 Cal. App. 785, 172 Pac. 93; *In re Mash* (1915), 28 Cal. App. 692, 152 Pac. 961.)

In *Spears, supra* (a case in which an applicant swore that he had not been charged with any crime, whereas he had been so charged but not convicted), the Supreme Court of California commented upon an applicant's duty to make full disclosure of his background:

"At the threshold of the discussion it should be stated as definitely settled in this state that irre-

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[10] "On a few occasions applicants have refused to answer certain pertinent questions and the Committee has rejected their applications for such reason. The Supreme Court in effect has upheld the Committee in such a case by refusing to consider it. *Cross v. Committee of Bar Examiners*, S. F. Nos. 18252, 18641 and 18922. Certiorari and mandamus denied. U. S. Supreme Court, Misc. 534 Oct. 1950 and Misc. 506 Oct. 1952.

* * * * * *

"... Sometimes the person under investigation invokes the privilege against self-incrimination. The Committee has declined to certify such persons for admission on the ground such refusal forecloses the Committee from effectively pursuing a legitimate and necessary line of inquiry. The California Supreme Court has recently denied a petition for writ of review in such a case. *Brooks v. Committee of Bar Examiners*, L. A. No. 23067; October 6, 1954." ("Character Investigation of Applicants for Admission," Gosco O. Farley, Secretary, Committee of Bar Examiners (1954), 29 Calif. State Bar Journal 454, 457, 466.)

spective of the outcome of any charges preferred against an applicant for admission to practice law in this state, whether he be convicted, acquitted or the charges dismissed, a duty rests upon said applicant to make a full disclosure of such charges to the committee charged with the duty and the responsibility of investigating his fitness to practice law in this state. We are aware that this requirement calls for a high degree of frankness and truthfulness on the part of the attorney making application for admission to practice law in this state, but no good reason presents itself why such a high standard of integrity should not be required. * * *"

Spears v. The State Bar, 211 Cal. 183, 187, 294 Pac. 697, 698.

In *Langert, supra*, involving an applicant who had concealed prior disbarment proceedings which had been initiated against him in another state, the court explained the reason for the requirement that an applicant make complete and truthful disclosures to the Committee:

"It was Langert's plain duty to truly reply to the questions asked by the Committee of Bar Examiners. (*In re Jacobsen*, 105 Cal. App. 236 [287 P. 131]; *In re Lasley*, 61 Cal. App. 59, 60 [214 P. 284].) The facts with respect to his prior conduct in the practice of the law in Illinois might have justified an order refusing to allow him to take the bar examination in this state. Truthful answers to questions bearing upon his conduct in the communities in which he had lived before

coming to California, at the least, would have justified further investigation of his record."[11]

State Bar v. Langert, 43 Cal. 2d, 636, 639, 276 P. 2d 596, 597.

Although the petitioner chose to obstruct the investigation of the Committee into his qualifications by defiance rather than the more devious methods employed by the applicants questioned in the above cases, the result was exactly the same. His conduct prevented any further inquiry into the area he sought to foreclose. As in the case of *Langert*, "truthful answers" by the petitioner to questions bearing upon his membership in the Communist Party "at the least, would have justified further investigation of his record."

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[11]The comments of the District Court of Appeal in the *Mash* case are likewise pertinent: "The only defense that the respondent would make, if permitted, to the charges contained in the accusation, is, as foreshadowed by the allegations of his answer, that it was his opinion at the time he made his application that the criminal and disbarment proceedings prosecuted against him in other jurisdictions were neither bona fide nor just, and that therefore, the court would have granted his application regardless of such proceedings. In other words, having convinced himself that he was innocent of the charges previously preferred against him he concluded that even if the court had been informed thereof, it would have treated them as matters of little or no moment. *If we were to concede the sufficiency of such a defense we would practically oust ourselves of jurisdiction to pass on the moral character of an applicant to practice law.* * * *" (Emphasis added.) (*In re Mash, supra*, 28 Cal. App. 692, 697, 153 Pac. 961, 963.)

C. The Refusal of the Supreme Court of the State of California to Admit to the Practice of Law an Applicant Who Prevents Determination of His Qualifications by Refusing to Disclose the Nature and Extent of His Association With the Communist Party in the Present and Recent Past Does Not Violate Any Constitutional Right of the Applicant.

The position taken by the petitioner before the Committee calls into question the very power of the State of California to admit to the practice of law only those who meet minimal qualifications determined by the State to be necessary in those vested with a vital public trust. For if petitioner is correct in his estimation of the limits imposed by the Constitution upon inquiry into the qualifications of applicants for admission to the Bar, the State will have no greater right to demand candid and frank disclosure from its prospective lawyers than from defendants before its criminal courts.

Each applicant for admission in California must execute under oath a formal application which contains inquiries regarding his age, residence, prior and present addresses, citizenship, occupation, general education, legal education and moral character. He is further required to furnish a set of his fingerprints. (*Rule VII, Rules Regulating Admission To Practice Law In California.*) Some of these avenues of inquiry are of paramount importance to a thorough investigation of the eligibility of the applicant; others, such as age where majority is not questioned, are of minimal or peripheral moment. However, few of the questions are directly related to the disclosure of illegal activities on the part of the applicant. Therefore, were petitioner's reasoning the law, an applicant might with impunity refuse to answer even the most important and relevant

questions posed to him and yet demand his admission to the Bar, for under petitioner's reasoning all that is required is that the applicant deny, in the terms of the statutes, the absence of prior illegal conduct and the advocacy of the forceable overthrow of the government. Inquiry regarding specific events or associations, however relevant to an investigation into the presence of the prescribed qualifications, is supposedly foreclosed by the constitutional protection against interference with freedom of speech. Fortunately, this result is not commanded by the Constitution. As pointed out by Mr. Justice Stewart with respect to the argument that the right of a lawyer to free speech might include the right to contumacious and unethical speech free from professional consequences,

> "A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. * * *"
>
> *Re Sawyer*, 360 U. S. 622, 646-647.

It cannot be emphasized too strongly that The State Bar and Supreme Court of California have no interest in curtailing the freedom of the petitioner's speech. We do not contend that he may not speak to a certain end or that he must speak. We do insist, however, that one who desires to be vested with a position in which the liberties and property of his fellow citizens are to be placed in his trust must be candid and frank in disclos-

ing all details regarding his background which may bear upon his qualifications to be awarded that trust.

The brief of the petitioner belabors the point that his every action before the Committee of Bar Examiners and the Supreme Court of California has been motivated by a singular highmindedness and devotion to principle. Whether the petitioner has chosen to contest the authority of the Committee of Bar Examiners and the Supreme Court of California because of an honest personal creed or because he has something to hide is known only to himself or to such of his associates as might be uncovered by a further investigation resulting from his truthful answers to the questions rebuffed. By his conscious and deliberate obstruction of the inquiry into his qualifications, he has narrowed the issue to the power of the State of California to require candid and frank disclosure by applicants for admission to the Bar of matters relevant to their qualifications therefor.

Unfortunately, an inquiry into Communist affiliations today often evokes an emotionally charged response in one direction or the other. Earnest defenders of the Constitution rush into each such situation on behalf of or against the individual questioned entirely without regard to the good faith or fairness of his examiners. To neutralize and highlight the basic and important issue before this Court, consider what the situation might have been had the petitioner refused to disclose his association with the Mafia or a group conspiring to rob a bank. Under such circumstances, would the Committee be compelled by the Constitution to recommend the admission of the petitioner to the practice of law although he had frustrated the inquiry

of the Committee into a matter vitally affecting his moral qualifications? So stated, it seems obvious that the State may condition admission into its Bar upon the disclosure or negation of associations of that character. The question then presented is whether the result should be different because the inquiry frustrated related to advocacy of forcible overthrow of the government and the questions rebuffed related to the applicant's present membership in the Communist Party. Reason and the decisions of this Court dictate a negative response.

(1) *The Inquiry by the Committee of Bar Examiners Into the Applicant's Present and Past Membership in the Communist Party Was Relevant to His Qualifications for Admission to the Bar and Did Not Relate to His "Political Beliefs."*

Section 6064.1 of the California Business and Professions Code requires that "no person who advocates the overthrow of the Government of the United States or of this State by force, violence or other unconstitutional means; shall be certified to the Supreme Court for admission and a license to practice law." As held by the Supreme Court of California; "this provision clearly requires the Committee [of Bar Examiners] to inquire as to such advocacy." [1960 Rec. p. 56.]

Both the Congress of the United States and the California Legislature have made specific findings that the Communist Party is an instrumentality of a foreign-controlled conspiracy to work the forcible overthrow of the Government of the United States.

68 Stat. 775, 50 U. S. C., Sec. 841 (Supp. 1954);
64 Stat. 987, 50 U. S. C., Sec. 781;
Calif. Gov. Code, Sec 1027.5.

Pertinent provisions of these statutes and similar authorities are set forth in Exhibit B.

This Court has also recently reiterated the relevancy of membership in the Communist Party to advocacy of the overthrow of the United States Government by force.

> "On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. [Citations] On the same premises this Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. [Citations] Similarly, in other areas, this Court has recognized the close nexus between the Communist Party and violent overthrow of government. [Citations] To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II, affairs to which Judge Learned Hand gave vivid expression in his opinion in

United States v. Dennis (CA2 NY) 183 F.2d 201, 213, and to the vast burdens which these conditions have entitled for the entire Nation."

Barenblatt v. United States, 360 U. S. 109, 128-129.

In spite of the overwhelming evidence of the nature of the Communist conspiracy and the findings of the various responsible branches of government, of which the above are but a sampling, the petitioner continues to sound the tired tocsin of forbidden intrusion into "political belief." (Pet. Br. pp. 18, 26, 39 and 41.) The Committee and the Supreme Court of California are not concerned with the petitioner's political beliefs; they are vitally concerned with his membership in an organization dedicated to forcibly dispossessing the citizens of the United States of their constitutional form of government.

We are not unmindful of the fact that an applicant may not be denied admission to the Bar solely because of membership in the Communist Party during the distant past and without regard to the character of or reasons for that association. However, we do contend that membership in this organization is relevant to an inquiry into advocacy of forcible overthrow and that an affirmative answer would justify further probing into the petitioner's knowledge and understanding of its aims and participation in its activities. No responsible agency of the government when faced with the issue has considered the contrary to be true. (*Orloff v. Willoughby*, 345 U. S. 83; *Garner v. Board of Pub. Wks.*,

of Los Angeles, 341 U. S. 716; *Adler v. Board of Education*, 342 U. S. 485; *Steinmetz v. Cal. State Board of Education* (1954), 44 Cal. 2d 816, 285 P. 2d 617.)

It is precisely this area of inquiry which has been denied to the Committee by the petitioner.

(2) *The Refusal of the Supreme Court of California to Admit to the Practice of Law an Applicant Who Obstructs an Inquiry Into His Qualifications by Refusing to Disclose Information Relevant to a Determination of Those Qualifications Does Not Violate Any Provision of the Constitution.*

The basis of the refusal of the Supreme Court of California to admit the petitioner is set forth in the opinion below:

> "Determination whether petitioner was a member of the party which has been legislatively determined to advocate overthrow of the government was blocked by his refusal to answer. * * * The committee's refusal to recommend him for admission was based upon his refusal to answer inquiries about his relevant activities—not upon those activities themselves. * * * Petitioner does not question the constitutionality of the code section which prohibits certification of one who advocates unlawful overthrow of the government, nor of the federal and state legislative declarations that the Communist Party seeks such overthrow. Implicit in the statutory provision for review of the committee's refusal to certify an applicant is the power of this court to admit one not so certified. But

to admit applicants who refuse to answer the committee's questions upon these subjects would nullify the concededly valid legislative direction to the committee. Such a rule would effectively stifle committee inquiry upon issues legislatively declared to be relevant to that issue. We cannot in good conscience deny the committee the right to inquire into a matter as to which it must certify." [1960 Rec. pp. 57-58.]

The validity of the Committee's inquiry and of the consequences to petitioner arising from his frustration of this inquiry is amply supported by the decisions of this Court.

For example, witnesses appearing before state and federal legislative committees investigating subversive activities may be punished for refusal to answer questions relating to their membership in the Communist Party or their association with Communist activities. (*Barenblatt v. United States*, 360 U. S. 109; *Uphaus v. Wyman*, 360 U. S. 72.) The action taken in both *Barenblatt* and *Uphaus* was far more restrictive of the individual's freedom to speak or not to speak than that taken by the court below. In each case, the subject of the inquiry was punished for his refusal to divulge either his membership in the Communist Party or the names of those persons connected with a camp deemed to foster subversive activities. Nevertheless, it was concluded "that the balance between individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended." (*Barenblatt v. United States*, 360 U. S. 109, 134.)

More directly to the point, public employees may be discharged from their employment for refusal, whether on claims of constitutional privilege or not, to answer questions by their employers relating to their membership in the Communist Party. (*Beilan v. Board of Education*, 357 U. S. 399; *Lerner v. Casey*, 357 U. S. 468; *Nelson and Globe v. County of Los Angeles*, 362 U. S. 1, 4 L. Ed. 2d 494.) Mr. Lerner created doubts regarding his "trust and reliability" as a subway conductor in New York by his refusal to answer questions by a state investigative agency pertaining to his present membership in the Communist Party. Mr. Globe lost his temporary position with the Los Angeles County Department of Charities as a result of his "insubordination" in refusing to answer questions posed by the House Un-American Activities Subcommittee relating to his membership in a subversive organization. In each instance, no violation of constitutional rights was occasioned by the dismissal of the recalcitrant witness.

Beilan v. Board of Public Education, 357 U. S. 399, is perhaps most directly dispostive of the issues in the case presently before this Court. In *Beilan*, this Court affirmed the dismissal of a Pennsylvania school-teacher on grounds of "incompetence" as evidenced by his refusal to answer to his Superintendent "whether or not he had been the Press Director of the Professional Section of the Communist Political Association in 1944." Just as did Mr. Konigsberg, Mr. Beilan refused to answer this question upon the ground that the inquiry was directed to his "political and religious" beliefs and that he was not obliged to answer such a question. On this basis, Mr. Beilan was found to have indicated his

unfitness and unsuitability as a schoolteacher by his refusal to answer the relevant inquiries of his Superintendent.

> "The question asked of petitioner by his Superintendent was relevant to the issue of petitioner's fitness and suitability to serve as a teacher. Petitioner is not in a position to challenge his dismissal merely because of the remoteness in time of the 1944 activities. It was apparent from the circumstances of the two interviews that the Superintendent had other questions to ask. Petitioner's refusal to answer was not based on the remoteness of his 1944 activities. He made it clear that he would not answer any question of the same type as the one asked. * * * The Board based its dismissal upon petitioner's refusal to answer any inquiry about his relevant activities—not upon those activities themselves. It took care to charge petitioner with incompetency, and not with disloyalty. It found him insubordinate and lacking in frankness and candor—it made no finding as to his loyalty."
>
> *Beilan v. Board of Public Education*, 357 U. S. 399, 405-406.

This Court held that the unquestioned right of a schoolteacher to the freedom of his speech did not serve to relieve him from his obligations of frankness, candor and cooperation in answering inquiries made of him by a Board examining into his fitness to serve as a public schoolteacher.

> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and co-

operation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher.

"'A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.'"

Beilan v. Board of Public Education, 357 U. S. 399, 405.

Unless this Court should find that the state has a less "vital concern" in the integrity of members of its Bar than in the integrity of its schoolteachers, subway conductors and socialworkers, the principles of the *Beilan, Lerner* and *Nelson* cases are directly applicable to this case. No prior decision of this Court has indicated the possibility of such a finding.

"The two judicial systems of courts, the state judicatures and federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals. '"Membership in the bar is a privilege burdened with conditions". (Matter of Rouss, [221 NY 81, 84, 116 NE 782]). The appellant was re-

ceived into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.' People ex rel. Karlin v. Culkin, 248 NY 465, 470, 471, 162 NE 487, 489, 60 ALR 851. * * *"

Theard v. United States, 354 U. S. 278, 281.

The quotation of Mr. Justice Cardozo from the *Rouss* case continues:

"Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards. * * * [Citing cases] Whenever the condition is broken the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning, is merely a test of fitness. * * *"

In re Rouss, 221 N. Y. 81, 116 N. E. 782.

The position of the attorney in California is one of responsibility and trust. "The right to practice law not only presupposes in its possessor integrity, legal standing and attainment, but also the exercise of a special privilege, highly personal and partaking of the nature of a public trust." (*Townsend v. The State Bar* (1930), 210 Cal. 362, 364, 291 Pac. 837, 838.) "An attorney at law is a member of an ancient, honorable and deservingly honored profession. He is regarded as an officer of the court, of any court in which he appears." (*People v. Mattson* (1959), 51

Cal. 2d 777, 793, 336 P. 2d 937, 949.) His responsibilities to the people of California are spelled out by the legislature in Business and Professions Code §6068:

"It is the duty of an attorney:

(a) To support the Constitution and law of the United States and of this State.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client.

(f) To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed."

California Business and Professions Code, Section 6068.

An order admitting an applicant to the practice of law is a judgment of the Court that the applicant possesses the requisite qualifications in both character and learning to fulfill this public trust. (*Ex parte Robinson*, 19 Wall. 505, 512.) Surely the body charged with investigating the qualifications of such an applicant has a legitimate interest in requiring a candid disclosure of factors bearing upon his qualifications equal to or greater than the interest of those charged with investigating schoolteachers, subway conductors and social workers.

The attempt of the petitioner to distinguish *Beilan* and similar cases is predicated upon the mistaken supposition that they may be pigeonholed under the label "public employee cases." In truth, the process applied in those cases and this case is identical. The interest of the public in requiring candor and frankness of the employee or applicant is balanced against the interest of that employee or applicant in refusing to divulge areas of his background. Applying this test, it seems to us that the scales tip more strongly toward full disclosure in the case of a prospective attorney than in the case of a minor public functionary.

We have noted the proprietary expropriation by petitioner and *amici curiae* of the concept of a fearless and independent bar, unafraid to defend one who espouses the unpopular cause. There is of course no dispute with the proposition that the achievement and maintenance of a bar of such composition is of paramount importance. In point of fact, the courts and legislature of the State of California have been assiduous in fostering an independent and fearless bar. (Bus. & Prof. Code §6068(h); *Gallagher v. Municipal Court*

(1948), 31 Cal. 2d 784, 192 P. 2d 905; *Chula v. Superior Court* (1952), 109 Cal. App. 2d 24; 240 P. 2d 398.) However, we cannot agree with petitioner and *amici curiae* that a *sine que non* to attainment of such a bar is the admission to it of those advocating the forcible demolition of our constitutional system of justice or those who refuse to divulge areas of their background directly bearing upon their qualifications to practice.

Finally, the time-honored technique of raising hypothetical future abuses on the part of the Committee is as irrelevant here as in any other case. Suppose the Committee purported to forbid political activity by attorneys? Suppose the Committee interrogated applicants regarding their religious beliefs? The oft-quoted statement of Mr. Justice Holmes regarding the power to tax is equally applicable to the power to investigate. "But this Court, which so often has defeated the attempt to tax in certain ways, can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits." (*Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U. S. 218, 223.) Similarly, in order to prevent unlikely future abuses by the Committee of its authority to examine the qualifications of applicants it is not necessary to destroy the regulation of the moral and professional fitness of the Bar.

(3) Petitioner Was Explicitly Warned of the Consequences of His Refusal to Answer.

Petitioner was clearly and unequivocally warned by the Committee of Bar Examiners that failure to answer the Committee's questions blocked their inquiry and would prevent his certification.

> "* * * As a result of our two-fold purpose, particularly our function of investigation, we believe it will be necessary for you, Mr. Konigsberg, to answer our material questions or our investigation will be obstructed. We would not then as a result be able to certify you for admission. * * *" [1960 Rec. p. 4; see also pp. 22, 26.]

Moreover, he was advised in detail of why these inquiries were considered necessary and why his refusal to answer would prevent his certification.

> "If you answered the question, for example, that you had been a member of the Communist Party during some period since 1951 or that you were presently a member of the Communist Party, the Committee would then be in a position to ask you what acts you engaged in to carry out the functions and purposes of that party, what the aims and purposes of the party were, to your knowledge, and questions of that type. You see by failing to answer the initial question there certainly is no basis and no opportunity for us to investigate with respect to the other matters to which the initial question might very well be considered preliminary." [1960 Rec. p. 29; see also p. 31.]

In *Beilan v. Board of Public Education*, 357 U. S. 399, the dismissed schoolteacher contended that he was not sufficiently warned. This argument was rejected:

> "Petitioner complains that he was denied due process because he was not sufficiently warned of the consequences of his refusal to answer his Superintendent. The record, however, shows that the Superintendent, in his second interview, specifically warned petitioner that his refusal to answer 'was a very serious and a very important matter and that failure to answer the questions might lead to his dismissal.' That was sufficient warning to petitioner that his refusal to answer might jeopardize his employment."
>
> *Beilan v. Board of Public Education*, 357 U. S. 399, 408.

Under no stretch of the imagination could the warning in the present case be said to be less explicit than that in the *Beilan* case. There can be no question that petitioner was fully and adequately warned and that lack of warning is not a factor in the present case.

VI.
Conclusion.

The prior decision of this Court did not purport to determine that the petitioner must be admitted to the California Bar. On the contrary, his case was remanded for further proceedings not inconsistent with the decision.

In the course of these further proceedings, the petitioner refused to answer questions pertaining to his association with the Communist Party in the present and recent past although repeatedly warned by the Com-

mittee examining him that his continued refusal would result in the Committee's failure to certify him for admission to practice. On the basis of its contruction of existing statutes, and in accordance with its holdings in previous cases, the Supreme Court of California refused to admit the petitioner on the ground that his willful failure to answer questions relevant to his qualifications to practice law had obstructed the inquiry of the Committee and prevented an intelligent determination of his qualifications.

The action of the California Supreme Court in refusing the petitioner admission upon this ground was an entirely reasonable and constitutional exercise of its authority to insure the professional and moral fitness of applicants who would practce before it.

The decision of the California Supreme Court should thetefore be affirmed.

Respectfully submitted,

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By FRANK B. BELCHER,
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EXHIBIT "A".

L. A. No. 23266.

In the Supreme Court of the State of California.

Raphael Konigsberg, Petitioner, v. State Bar of California and the Committee of Bar Examiners of the State Bar of California, Respondents.

Report of the Committee of Bar Examiners.

To the Honorable Phil S. Gibson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the State of California:

I.

On July 10, 1957, the following order was made in the above entitled matter:

"Pursuant to mandate of the Supreme Court of the United States, it is ordered that the decision of this Court, filed April 20, 1955, be vacated, and the matter of admitting Raphael Konigsberg to the the practice of law in all the courts of this State is referred to the Committee of Bar Examiners for further proceedings.

"CARTER, J. is of the opinion that the application of Raphael Konigsberg for admission to practice law in all of the courts of this State should now be granted.

/s/ Gibson, Chief Justice."

II.

Pursuant to this order, the following action was taken by the Committee of Bar Examiners in the matter of the application of Raphael Konigsberg for admission to practice law in the State of California:

(1) The Committee carefully considered the opinion of the Supreme Court of the United States in the mat-

ter entitled "Raphael Konigsberg, Petitioner, v. State Bar of California and Committee of Bar Examiners of the State Bar of California", decided May 6, 1957, 353 U. S. ...., 1 L. Ed. 2d 810, 77 S. Ct. ....

(2) On September 21, 1957, at a meeting of the Committee in Los Angeles, at which all of the members of the Committee were present, the applicant appeared with his attorney, Edward Mosk, Esq. At this meeting the applicant's petition for admission was further heard by the Committee. An argument by the attorney for the applicant in support of the application for admission was also heard. The applicant was sworn and testified at the hearing. A witness produced by the applicant was sworn and testified. Written evidence was offered by the applicant, and was received by the Committee. The written record of all previous hearings by the Committee and one of its subcommittees on the application of Raphael Konigsberg for admission was incorporated as part of the record of the further hearing, by the stipulation of the applicant and by the Committee.

(3) The application was then submitted by the applicant and by his attorney.

III.

At the hearing on September 21, 1957, the committee advised the applicant and his attorney that the refusal of applicant to answer material questions put to him by the Committee would obstruct the investigation by the Committee of applicant's qualifications for admission to practice law, with the result that the Committee would not be able to certify him for admission

IV.

At the hearing on September 21, 1957, applicant refused to answer any questions put to him by the Committee concerning his past or present membership in or affiliation with the Communist Party.

V.

After further consideration of the entire record before it, the Committee finds and concludes:

(1) That the questions put to the applicant by the Committee concerning past or present membership in or affiliation with the Communist Party are material to a proper and complete investigation of his qualifications for admission to practice law in the State of California.

(2) That the refusal of applicant to answer said questions has obstructed a proper and complete investigation of applicant's qualifications for admission to practice law in the State of California.

(3) That the refusal of applicant to answer said questions has obstructed a necessary and proper function of the Committee under Section 6046 and related sections of the Business & Professions Code of the State of California and under the Rules Regulating Admission to Practice Law in California adopted pursuant to Section 6047 and related sections of said Code.

(4) That in view of the foregoing, the Committee is unable to certify that applicant possesses the requisite qualifications or has fulfilled the requirements for admission to practice law in the State of California.

In Witness Whereof, the Committee of Bar Examiners of the State Bar of California respectfully submits this report of its proceedings on the reference made

to it by the Supreme Court of the State of California on July 10, 1957, together with the transcript of the hearing before the Committee on September 21, 1957, and the exhibits submitted by the applicant at that hearing.

Dated: November 9, 1957.

Sharp Whitmore,
Vincent H. O'Donnell,
George Harnagel, Jr.
Forrest E. Macomber,
Gerald P. Martin,
Thomas H. McGovern,
John B. Surr,
The Committee of Bar Examiners
of the State Bar of California,
By Sharp Whitmore,
Chairman.

EXHIBIT "B".

The United States Congress has found:

"The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. * * *"

68 Stat. 775, 50 U. S. C. Sec. 841 (Supp. 1954).

"As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

* * *

"(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement. . . .

* * *

"(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straights, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such

preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such worldwide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

64 Stats. 987, 50 U. S. C. Sec. 781.

Similar findings have been made in California:

"(a) There exists a world-wide revolutionary movement to establish a totalitarian dictatorship based upon force and violence rather than upon law.

* * * * * * * *

"(d) Within the boundaries of the state of California there are active disciplined communist organizations presently functioning for the primary purpose of advancing the objectives of the world communism movement, which organizations promulgate, advocate, and adhere to the precepts and the principles and doctrines of the world communism movement. * * *

"(e) One of the objectives of the world communism movement is to place its members in state and local government positions and in state supported educational institutions. * * *

"There is a clear and present danger, which the Legislature of the State of California finds is great and imminent, that in order to advance the program, policies and objectives of the world communism movement, communist organizations in the State of California and their members will engage in concerted effort to hamper, restrict, interfere with, impede, or nullify the efforts of the State and the public agencies of the State to comply with and enforce the laws of the State of California and their members will infiltrate and seek employment of the State and its public agencies."

Cal. Gov. Code, Sec. 1027.5

Judicial findings and comments have confirmed these legislative findings. The following are illustrative:

"The jury found that the Party rejects the basic premise of our political system—that change is to be brought about by nonviolent constitutional process. The jury found that the Party advocates the theory that there is a duty and necessity to overthrow the Government by force and violence. It found that the Party entertains and promotes this view, not as a prophetic insight or as a bit of unworldly speculation, but as a program for winning adherents and as a policy to be translated into action."

Dennis v. United States, 341 U. S. 494, from concurring opinion of Mr. Justice Frankfurter at pages 546-547.

"The Communists have no scruples against sabotage, terrorism, assassination, or mob disorder; but violence is not with them, as with the anarchists, an end in itself. The Communist Party advocates force only when prudent and profitable. Their strategy of stealth precludes premature or uncoordinated outbursts or violence, except, of course, when the blame will be placed on shoulders other than their own. They resort to violence as to truth, not as a principle, but as an expedient."

Dennis v. United States, 341 U. S. 494, from concurring opinion of Mr. Justice Jackson at page 564.

"1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate. * * *

"2. The Communist Party alone among American parties past or present is dominated and controlled by a foreign government. * * *

"3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal. * * *

"4. The Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement. * * *

"5. Every member of the Communist Party is an agent to execute the Communist program. * * *"

American Communications Assoc. v. Douds, 339 U. S. 382, from concurring and dissenting opinion of Mr. Justice Jackson at page 425-431.